**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS NO. 204 OF 2005**
**IN**
**SUIT NO. 535 OF 2000**

ICICI Ltd
(Debenture Trustees) .....Plaintiffs
vs.
Kothri Industrial Corporation
Ltd and Ors. .... Defendants

AND

Prithviraj Infrastructure
P.Ltd, Hyderabad .....Respondents

Virag V. Tulzapurkar with C.S. Kapadia and Ms. Rajashree Bhat i/b.M.K. Ambalal and Co. for the plaintiffs.

Janak Dwarkadas Sr. Counsel with C. Mody, Mr. Shiva and Ms. S. Kaul i/b. R. Miti Law and Associates for the defendants.

J.P. Cama with Vimal Bhabhada i/b. Ms. Laxmi Jasani for purchasers/respondents.

Mr. M.H.I. Patel, Representative of Court Receiver present.

**CORAM: S.U. KAMDAR. J,**

**DATED : 20TH APRIL, 2005.**

**JUDGMENT :**

1. The present chamber summons is a classic example of how the legitimate claim of a creditor can be defeated by technical and legal wrangles raised by the debtors. The efforts do not end with the passing of the decree but continue even in execution of the decree thereof.

2. In the present case execution of the decree is sought to be obstructed by raising the issue of jurisdiction of this court by relying upon the provisions of sub-section (4) of section 39 of Civil Procedure Code as amended by amending Act of 2002.

3. This chamber summons has been taken out under order 21 rule 89, rule 90 and under section 151 of the CPC. Some of the brief facts which are relevant to determine the issue raised by the judgment debtor are briefly enumerated as under :

4. A suit has been filed by the plaintiffs who are a financial institution known as ICICI Limited in their capacity as Debenture Trustees for the recovery of Rs.6,84,91,000/-. In 1993 the first defendant issued

debentures and raised the funds of about Rs.19,00,000/-. The said debentures were secured debentures and to secure the interest of the debentures holders the plaintiff was appointed as a debenture trustee. The total liability in the said defendants thereunder was around Rs.18.97 crores. The defendant company made part payments in discharge of the said liabilities. However admittedly there were defaults by the company to make the payment of the balance amount. From time to time the defendants sought time from the plaintiff to repay the amount which was outstanding under the said debenture trust. However the defendants failed and neglected to make the payment of the balance amount due and payable. Some time in or about January, 2000 a suit was filed for the balance amount with interest accrued thereon. At that time it was around Rs.6 crores. The said suit was filed in this court being Suit no. 535 of 2000. The properties which are mortgaged in favour of the plaintiff under the said debenture trust are situated in the state of Tamil Nadu and in the state of Gujrat. In the said suit on 23.6.2000 consent terms were filed. Under the said consent terms the

defendant has admitted the repayment of an amount of Rs.6,85,23,000/- and has also agreed that the said amount will be repaid in certain instalments. Thus by the said consent terms a decree has been passed in favour of the plaintiffs and against the defendants for the aforesaid amount. The consent terms also inter-alia provides that in an event of default in making the payment, the court Receiver High court shall stand appointed without any further orders in execution of the decree and shall have a power to take possession of the properties set out in exhibits to the plaint and will be entitled to sell the same either by public auction or private treaty and the net sale proceeds will be adjusted against the said decree. The said clause-9C of the consent terms reads as under :

"9.....

> (c) The Court Receiver, High Court, Bombay shall without any further order stand appointed by Bombay High Court as Receiver in execution with power to take possession of the properties set out in Exhibit-A1, A-2, A-3, A-4, A-5, B-1, B-2 and C to the Plaint and sell the same either by public auction or private sale and the court Receiver do pay over the net sale proceeds thereof

> to the plaintiff/Debentureholders towards payment of decretal amount payable by the Defendant no.1 subject to the rights of the other chargeholders."

5. It is an admited position tht the defendants failed to make payment of instalment amount as prescribed under the said consent decree and thuis the said decree became executable as provided under the aforesaid clause 9-C of the consent terms.

6. Thereafter the judges order was taken out being 32 of 2004 for taking forcible possession of the said assets of which court receiver was appointed as a receiver. By order dated 10.2.2004 the learned single judge of this court once again granted indulgence to the first defendant to pay the defaulted amount under the decree on or before the first week of April, 2004.

7. Thereafter the workers union of the company also filed a writ petition in this court being Writ Petition No.823 of 2004. Once again by an order

dated 2.4.2004 the matter was adjourned for amicable settlement between the parties but ultimately no settlement was arrived at and thus on 29.4.2004, the said petition was also dismissed.

8. There were admittedly defaults in repayment of the instalments amount as stipulated in the consent terms. In view thereof the receiver stood appointed and the receiver commenced the proceedings for disposal of the assets. In the course of the said sale on 12.1.2005 on the report of the court receiver dated 4.1.2005 this court once again gave a chance to the defendant to pay the entire decreetal amount on or before 15.2.2005 and the defendant agreed to make payment of Rs.1 crore towards the part payment of the said decreetal amount to show their bonafide. Inspite of the said indulgence being granted the defendant failed to make the payment as agreed upon.

9. Overcoming all these legal wrangles the plaintiff put the said mortgage properties for sale but still the present chamber summons has been taken out to forstall the completion of the said sale. By

my ad-interim order dated 7.3.2005 passed in the present chamber summons I directed that all further actions in execution of the said decree shall be subject to the final outcome of the present chamber summons. The matter was thereafter mentioned by both the parties before me and I was requested to take up the matter expeditiously in view of the urgency involved in the present case. Accordingly the present chamber summons is heard.

10. This camber summons is taken out under order 21 rule 89 and order 21 rule 90 read with section 151 of CPC for the reliefs that the sale of the said properties described in Exhibit-1 and 2 to the chamber summons which has been conducted by public auction on 14.12.2004 and confirmed by this court by an order dated 15.2.2005 be set aside and all further proceedings in execution of the said the consent decree dated 23.6.2000 to be declared null and void and set aside.

11. The main contention on the basis of which aforesaid reliefs are sought are the provisions of

sub-section (4) of section 39 of the CPC which has been introduced by an Amending Act of 2002. It has been contended that by virtue of amendment to the said provisions of section 39. It is not open for this court to execute a decree against any person or property which is not situated within the local limits of its jurisdiction . It has been contended that in the present case the decree is sought to be executed by this court in respect of the properties which are situated in the State of Tamil Nadu. According to the learned counsel the same is not permissible in view of the aforesaid provision and that the decree must be transmitted to the Court in Tamil Nadu for its execution. According to the learned counsel the said execution of the decree without transmission thereof is without jurisdiction and the same is null and void and bad in law. It is therefore contended that the execution proceeding initiated by the respondent judgment creditor is illegal, unlawful and is liable to be set aside. It has been contended that the appropriate court which has jurisdiction is that within whose local limits the said properties are situated and it is not open

for the judgment creditor to execute the decree via the mode of court receiver in contravention of the mandate of law under sub-section 4 of section 39. It has been contended that after the amendment in 2002 to the CPC it is the mandate of law that only the court within whose local limits the said properties are situated alone shall have jurisdiction and no other court. The learned counsel in support of the aforesaid contention has relied upon the provisions of Section 39 and Section 51 of the CPC and it is contended that the provisions of section 51 of the CPC which contemplates different modes of execution to enforce the decree opens with the words "subject to such conditions and limitation as may be prescribed". The words "subject to such conditions and limitations as may be prescribed" according to the learned counsel for the applicant judgment debtor is the limitation prescribed by virtue of the provisions of section 39(4) of the CPC and therefore the decree cannot be executed unless the said conditions as contemplated under sub-section 4 of the said section 39 is complied with. It has been thus contended that execution of the decree by any of the

modes prescribed under the section 51 must be comply with the terms and conditions and limitations prescribed in the code and one such condition prescribed is under sub-section 4 of section 39. It is therefore contended that even if the execution has been resorted to via the mode of the court receiver as contemplated under sub-clause (d) of section 51 still it is be to be executed only by the court within whose local limits the properties are actually situated. It is therefore contended that the execution of the decree by the court receivers of this court in the present case without the transmission of the decree to the court where the said properties are situated in the state of Tamil Nadu is bad in law and consequently steps taken thereof are also illegal and without any merits.

12. On the other hand the learned counsel for the plaintiffs as well as the learned counsel for the auction purchaser of the said properties has contended that this court is totally empowered to execute its own decree and it has complete

jurisdiction to execute the decree without the transmission thereof to the Court where the properties are situated. It has been contended that the provisions of section 39 of the Act even after amendment do not apply to the execution of a decree through a Court Receiver. It is further contended that it is permissible to execute a decree under sub-clause(d) of section 51 via the receiver and the same can be done by this court which is a court who has passed the decree. In respect of the aforesaid contention the learned counsel has relied upon the provisions of S.37 and S.38 of the CPC and emphasized that the decree can be executed either by the court which has passed the same or the court to which it is has been sent for execution. It has been contended that it is only when the court decides that the decree is required to be sent for execution that the provisions of section 39 are applicable. If not, the court under S.38 is sufficiently empowered to execute its own decree. It has been further contended that there is no change in the position of law after the introduction of amendment which is in 2002 since the said amendment in fact codifies the view held by this

court in the case of Sahaba Yeshwant Naik vs Vindel Kumar reported in AIR 1985 Bom.79.

13. It has been further contended by the learned counsel for the respondent that the provisions of order 21 in its entirety do not apply in cases of an execution of a decree by the court receiver. It has been contended that execution of a decree by a court receiver is a totally different mode of execution and provisions of order 40 rule 1 apply and not the provisions of order 21 of the CPC. Alternatively it is contended by the learned counsel for the plaintiff judgment creditor that the present chamber summons should be dismissed because it is barred by the principle of resjudicata a well as it is not maintainable under order 21 rule 89 and order 21 rule 90 of the CPC. It has been further contended that the defendant judgment debtor is estopped from raising the aforesaid objections because he has consented to the execution of a decree by entering into the consent terms wihich interalia provides for mechanism of execution via the court receiver. It is also contended that the judgement debtor is not

entitled to raise the aforesaid objection becuase in earlier round of proceedings in execution he has not raised any such objection and in fact consented to the execution of decree by this court by its ommission to raise the objections. The learned counsel for decree holder has also pressed in service the doctrine of constructive resjudicata in the aforesaid facts. Learned counsel for the plaintiff has relied upon section 11 particularly the explanation 3, 4 and 5 and has contended that by virtue of the provisions contained in the said explanation to s.11 of the CPC the defendant judgment debtor is not entitled to raise the said issue. It is alternatively contended that order 21 rule 89 inter-alia contemplate that the objection to the sale must be taken up by the judgment debtor at the earliest point of time and the court must satisfy itself that the applicant has sustained substantial injury due to such material irregularities in conducting the sale of the said properties. It has been firstly contended that the defendant judgment debtor has not been able to show any material irregularity which has resulted in subsequent injury

to the respondent judgment debtor. It is contended that there is a substantial delays in approaching this court because the applicant could have taken up the aforesaid issue on or before the date of proclamation of sale and failure on the part of the judgment debtor to do so would disentitled him to raise the said issue at this juncture.

14. Before I deal with the rival contentions it is necessary that the relevant provisions of law as well as authorities cited by the rival parties set out inseratime. The relevant provisions are as under :

> "38. Court by which decree may be executed- A decree may be executed either by the court which passed it, or by the court to which it is sent for execution.
>
> 39. Transfer of decree.-(1) The court which passed a decree may, on the application of the decree holder send it for execution to another court of competent jurisdiction.
>
> (a)if the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain, within the local limits of the jurisdiction of such other court, or

(b)if such person has not property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of jurisdiction of such other court, or

(C)if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or

(d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

(2) The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

(3) for the purpose of this section a court shall be deemed to be court of competent jurisdiction,if at the time of making the application for the transfer of a decree to it, such court would have jurisdiction to try the suit in which such a decree was passed.

51. Powers of court to enforce execution-Subject to such conditions and limitations as may be prescribed the court may, on the application of the decree holder order execution of the decree

(a) by delivery of any property specifically decreed.

(b) by attachment and sale or by sale without attachment of any property

(c) by arrest and detention in prison

(for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section];

(d) by appointing a receiver, or

(e) in such other manner as the nature of the relief granted may required; [Provided that, where the decree is for the payment of money, execution debtor an opportunity of showing cause why he should be not be committed to prison, the Court, for reasons recorded in writing, is satisfied.-

(a) that the judgment debtor with the object or effect of obstructing or delaying the execution of the decree.

(i) is likely to abscond or leave the local limits of the jurisdiction of the court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property or committed any other act of bad faith in relation to his property, or

(b) that judgment debtor has or had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

Explanation- In the calculation of the means

of the judgment debtor for the purposes of clause (b) there shall be left out of account any property, which by or under law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

89. Application to set aside sale on deposit-
(1) Where immovable property has been sold in executinof a decree any person claiming an interest in the property sold at the time of the sale or at the time of making the applicaiton or acting for or in the interest of such person,] may apply to have the sale set aside on his depositing in Court-

(a)for payment to the purchaser, a sum equal to five per cent of the purchase money and

(b)for payment to the decree holder, the amount specified in the proclomation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclomation of sale, havwe been received by the decree holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment debtor from any liability he may be under in respect of costs and interest not covered by the procolamation of sale.

90. Application to set aside sale on ground of irregularity or fraud- (1) Where any immovable property has been sold in execution of a decree, the decree holder, or the

purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3)No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclomation of sale was drawn up.

Explanation-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

15. Mr. Tulzapurkar appearing for the plaintiff judgment creditor in support of his contention has relied upon the judgment of the apex court in the case of **Tarinikamal Pandit and Ors vs. Perfulla Kumar Chatterjee reported in AIR 1979 SC 1165 particularly para-16 of the said judgment which reads as under :**

"16. The second question the learned counsel raised was that the suit is barred under section 66 of the Civil Procedure Code. The trial court overruled the plea on the ground that although the sale in question is a court sale it is not according to the rules prescribed by the Civil Procedure Code but only according to the Rules of the Calcutta High Court on the Original Side. The learned counsel submitted that the purpose of Section 66, Civil Procedure Code, applies equally to the court sales conducted under Rules of Civil Procedure Code as well as those conducted under the High Court Rules. Reliance was placed on a decision of the Privy Council in Bishun Dayal v. Kesho Prasad AIR 1940 PC 202, where the only case pleaded by the plaintiff was that the person through whom he claimed derived his right to half of the village from the auction purchase having been made in part on his behalf by the auction purchaser, it was held that the claim was barred by Section 66, Civil Procedure Code, inasmuch as no case independent of auction purchase and basing title upon such subsequent plaint. Section 66 of the Civil Procedure Code run as follows :-

> "66.(1) No suit shall be maintained against any person claiming title under a purchase certified by the court in the manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.
>
> (2) Section 66 prohibits any person claiming that a purchase certified by the court in such manner as may be prescribed in favour of a person was made on behalf of the plaintiff. In order to invoke the prohibition it is necessary to establish that the person against whom the suit cannot be maintained is a person claiming title under a purchase certified by the

court in such manner as may be prescribed. A certificate by the court for the purchase in the manner prescribed is therefore essential. The word "prescribed" is defined under Section 2 (16) of the Civil Procedure Code as meaning prescribed by the Rules. The provisions as to grant of a certificate by a court under Order 21 Rules 64 to 73 prescribe the procedure relating to sale of immovable property. When the court makes an order confirming the sale under Order 21 Rule 92, the sale becomes absolute. After the sale becomes absolute under Rule 94 the court shall grant a certificate specifying the properties sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate is required to bear the day and the date on which the sale became absolute. The certificate by the court referred to in Section 66 is a certificate under Order 21 Rule 94. The procedure envisaged for sale generally and sale of immovable property under O.21 is sale by a public auction. Sale by a court through the Receiver appointed by court is not contemplated under these provisions. In a sale by a Receiver a certificate to the purchaser under O.21 Rule 94 is not given by the Court. Therefore the prohibition under S.66 cannot be invoked in the case of a sale by the Receiver. A receiver is appointed under O.40 R.1 and a property can be sold by the Receiver on the directions of the court even by private negotiations. The requirement of S.66 of the CPC is a certificate by the court as prescribed. In this case the conveyance Ex.5 was in accordance with the Original Side Rules of the High

> Court. In the view we have taken that Section 66 is not applicable to sale by Receiver it is not necessary to go into the question whether a sale by the Receiver under the Rules of the Calcutta High Court would come within the purview of Section 66, Section 66 refers to execution sales only and has no application to a sale held by a Receiver. In this view the objection raised by the learned counsel for the defendant has to be rejected.

16. Learned counsel has also relied upon the judgment of the apex court in the case of **Jibon Krishan Mukherjee and Anr. vs. New Beerbhum Coal Co.Ltd reported in AIR 1960 SCC 297 (V 47 C 52) and particularly para-7 of the said judgment.** Learned counsel has thereafter relied upon the judgment of the division bench of the Allahabad High Court in the case of **Bhagwati Prasad Bajpai vs. Jai Narain Hanuman Das reported in AIR 1958 Allahabad 425** He relied upon particularly on para 17 and 21 of the said judgment

> "17. Now it has already been mentioned that the appointment of a receiver

> falls outside the general rule of territoriality even so far as sale of property is concerned through the receiver. See the ruling reported in ILR 57 Cal 964: (AIR 1930 Cal 502) (A)."
>
> 21. The Code apparently also treats the case of property held in custody by a court or by an officer on a footing somewhat different from that of property held in private custody by private parties. The Code treats the money, in which the judgment debtor has an interest but which is disbursable by an officer on a separate footing under O XXI R.48. Likewise by O.XXI R/\.52 the court places the property belonging to a judgment debtor in the custody of a court or of a public officer or a separate basis. Now when property or money is in the custody of a public officer or a court, the judgment debtor has no possession over the same."

17. Learned counsel has thereafter relied upon the judgment of the Calcutta High Court in the case of **Benaras Ice Factory Ltd vs. Sukhlal Amarchand Vadnagara reported in AIR 1961 Calcutta 422(V 48 C 90).** He has relied upon para 21 and 22 of the said judgment and bracketed portion of para-23 which reads as under.

> "21. Counsel for the plaintiff contended

that the effectiveness of an order of this court rested on its physical power of its capacity to enforce or execute it. The Code of Civil Procedure is ample proof that a decree of one court can be executed in another court. Counsel contended that such a mode of execution would be the only mode. Am order which is capable of execution is not a nullity. In the case reported in Bhagwan Shankar V. Rajaram AIR 1951 Bom.125(FB) Chagla, C.J. explained the phrase 'absolute nullity'as something which can never be enforced in any part of the world under any circumstances. That which is a nullity does not exist and need not be taken notice of. In the Faridkote case the Judicial Committee contemplated that a decree which is a nullity under International Law can be enforced in the forum by which it was passed provided special local legislation authorised that forum and therefore in a limited sense the decree was a nullity. Chagla, C.J said that the decree would be a valid decree but it would not be enforceable in a court other than the Court where it was passed by reason of International Law. The distinction, therefore, is to be noticed between a decree which is an absolute nullity and a decree to which there is an impediment in the matter of its execution. The difficulty in the way of execution does not render a decree nullity and an irregular execution of a decree will not render a decree a nullity. The Court has jurisdiction to decide rightly or wrongly and a wrong exercise of jurisdiction will not render an order or a decree a nullity.. If the Court has jurisdiction to pass an order, as in the present case undoubtedly the court had, there does not appear any reason as to why or how that exercise of jurisdiction by the court amounts to either a lack of jurisdiction in the court itself or a lack of jurisdiction in making the order.

22. I should, now refer to the decision in

Ranjit singh Nahar v. Gobardhan Chandra Chandra, 50 Cal WN 447. A suit for money in the ordinary original jurisdiction of this court was instituted under Cl.12. There was a decree on compromise. By the decree a charge was created upon land outside the jurisdiction and power was given to the decree holder to enforce the charge by sale in execution without recourse to a fresh suit. In the present case it was similarly provided by the decree that the decree-holder would be at liberty to execute the decree by sale of the properties charged by application in execution in this suit without being obliged to institute any suit in Banaras. It was held that the compromise was lawful and the court having jurisdiction to try the suit, had the right to make the decree in accordance with the compromise that the property could be sold in execution of the decree. Gentle, J held in the case referred to above that the agreement of compromise can validly include matters which are not the subject matter of a suit and so long as the agreement relates to the suit the Court has authority or jurisdiction under o. 23 R.3 of the code to pass a decree in accordance with its terms. There is nothing unlawful for a debtor before a suit to compromise his debt, or his creditors claim by agreeing to give a charge over an immovable property situated outside the territory of the court which would have jurisdiction to entertain a suit by the creditor, if proceedings were instituted for the debt. The giving of a charge upon land outside that territory is not unlawful. Would it become unlawful if such an agreement is made after a suit for the debt has been instituted in that court to compromise the claim? Such an agreement was held to be valid and lawful. As to the question of enforcement of charge, Gentle J. said:

> "The court is not without jurisdiction to order the sale of immovable property lying outside its territory, it can

> encartain a mortgage suit where part of the hypothecate is situated within and part outside the jurisdiction and sale of the outlying property can be ordered similarly with regard to family immovable property in a partition suit. In that case, such property is with respect to the suit; when, as in the present case a charge upon such property is made in an agreement to compromise the suit, which agreement relates to the suit, the property also must have similar relation.

Reference was made to the decision in Dinendra Mallik v. Pradyumna Kumar Mallik, ILR 62 Cal 28(AIR 1935 Cal 596) and the decision of the Judicial Committee in Pisani v. Attorney General of Gibraltar, (1874) LR 5 PC 516 in support of the proposition that parties by an agreement can arrange their own procedure and give jurisdiction to the court to adopt that procedure and when the parties have agreed that monies shall be realised by execution, the court has jurisdiction to proceed by way of execution. If the court would have no jurisdiction to entertain the suit the parties could not by agreement confer jurisdiction but if the court had jurisdiction with regard to the suit, the parties can give jurisdiction to the court as to how their money would be realised by execution. In Mannalal Srimal v. Nehalchand Samsukha, 41 Cal WN 1133 Panckridge, J observed that although suit for sale of property would have been dismissed on the ground of want of jurisdiction, inasmuch as no property was situated within the local limits of the jurisdiction, it would be no ground for refusing to make an order, for sale in execution of the decree.

23. Be that as it may, it is clear in my view that the existence of jurisdiction and the exercise of jurisdiction are both present where the court appoints a Receiver in

> execution of a decree as in the present case. The root of jurisdiction is founded upon the decree. The decree is unassailable. The enforcing of the decree is a part of the decree and agreement between the parties. It is because of the decree and the agreement embodied therein that this court has executed the decree. In my opinion the decree is executable by this court and orders in execution are within the jurisdiction of this court. Such orders are effective as well."

18. The learned counsel has thereafter relied upon the judgment of the apex court in the case of **Hira Lal Patni vs. Sri Kalinath reported in AIR 1962 SCC 199**. Learned counsel appearing for the auction purchaser which supporting the contentions of the plaintiff decree holder has relied upon the judgment of the apex court in the case of **Jank Raj vs. Gurdial Singh and Anr reported AIR 1967 SC 608** and the judgment of the apex court in the case of Jibon Mukherjee (supra). He has placed stress on para-11 of the said judgment which is reproduced hereunder :

> "11. In Zain-ul-Abdin Khan v. Muhammad Asgar Ali Khan (1888) ILR 10 All 166 (PC) certain sales had been held in execution of an exparte decree and some of the properties were bought by bonafide purchasers. The decree was modified afterwards as a result of an appeal

> to Her Majesty in Council and it was found that as the decree finally stood, it would have been satisfied without the sales in question having taken place. The judgment debtor sued the purchasers of some of the sales including holders of the decree and bonafide purchasers. It was held by the Judicial Committee that as against the bonafide purchasers who were strangers, the suit must be dismissed."

19. The learned counsel for the judgment debtor has on the other hand the judgment of this court in the case of **Bank of Tokyo-Mitsubishi Ltd vs. M/s. Chembra Estates, Bombay and Ors reported in AIR 2001 Bombay 170.** He has also relied upon the judgment of the apex court in the case of R.P.A. Valliammal v. R. Palanichami Nadar and ors. reported in A.I.R..1997 SC 1996.

20. I have heard the counsel for the parties at length. Before I deal with the main point of contention that whether the decree is required to be transmitted for execution to the court within whose local limits the said properties are situated in my opinion it is necessary to deal with two incidental

points which are raised by the learned counsel for the judgment creditor. The first contention raised is on the basis of resjudicata and principle of estoppel. I am not inclined to accept the contention of the learned counsel for the plaintiff that the present chamber summons is barred by the principle of resjudicata or constructive resjudicata. The provisions of S.11 of the CPC which deals with the doctrine of resjudicata and or constructive resjudicata inter-alia contemplates that there must be a prior proceedings between the same parties directly and subsequently raising the very same issue and the said proceedings ought to have decided on merits. In the present case I do not find any prior proceedings in which the validity of the execution of the decree has been put in issue by the defendant judgment debtor. The contention of the learned counsel that the proceedings in the nature of Judges order as well as report of the court receiver taken in execution of the said decree ought to be treated as a prior proceedings in which the defendant judgment debtor could have raised the issue about validity of the execution of the said decree, is not possible to

accept. The said prior proceedings were not a proceedings in which the validity of execution of decree was put in issue. It is also clear that the said report of the court receiver as well as the Judges order were only taken as a step in further execution of the said decree not questioning the validity of the said decree. In view thereof it is not possible to apply the principle of resjudicata and or principle of constructive resjudicata to the present case. Equally I am not impressed with the argument that the defendant judgment debtor are estopped from raising the validity of execution of the said decree by way of present chamber summons because the principles of issue estoppel do not apply vice a versa the provisions of law and/or jurisdiction of the court is concerned. It cannot be stated that the court can confer itself with the jurisdiction which does not have of by virtue of the principles of issue estoppel. An issue of jurisdiction of court going going to the roof of the matter it cannot be ignored by applying principles of issue estoppel. I therefore do not accept the aforesaid contention advanced by the learned counsel for the plaintiff decree holder. I am

not equally inclined to accept the contention that the provisions of order 21 rule 89 should be so strictly construed that the person can be deprived of his right to raise contention merely on the ground of delay. The apex court has in its judgment in the case of R.P.A. Valliammal vs. R. Palanichami Nadar and Ors reported in AIR 1997 SC 1996 which has been relied by the defendant judgment debtor has inter-alia held that the provision of order 21 Rule 89 and Order 21 Rule 90 must be liberaly construed.. The relevant portion of the judgment reads as under :

> "Order 21, Rule 90(3), CPC may not be strictly construed so as to put a fetter on the court, due to non raising of the objections before proclomationo of sale and the objection could be raised even at a latter stage, but since the title was already being lost and has become final, the petitioner cannot agitate the executability of the decree in the absence of any legal title to question the correctnesss of the execution.

21. This leads me to the main contention between the the parties that whether the provisions of s.39 of CPC are at all applicable. In my opinion the provisions of S.39 of the CPC are not applicable in cases of

execution of the decree via the court receiver under clause (d) of section 51 of the CPC. The CPC in part II provides for the provisions of a decree under section 38 therein provides that the execution of a decree can be done either by the court passing the decree itself or by transmitting to other court of competent jurisdiction. Thus the power of execution of the decree by the court which has passed the decree is intact till the court decides that in the facts of a case the transmission of the decree to other court is necessary for the purpose of execution. The provisions of s.39 only aplies when the said transfer of the decree to the court of competent jurisdiction is necessary. The said S.39 provides four eventualities in which the decree has to be transferred to the court of competent jurisdiction. We are concerned with sub-caluse(b) and (d) of the S.39. The said sub-clause(b) provides that if the person has property within the local limits of the jurisdiction of the court which has passed the decree to satisfy the decree then the property can be transferred to the local limits of that court where the properties are situated. Sub-clause (d) provides

that if the court which passed the decree considers for any reason which may be stated in writing, that decree should be executed by other court then only the decree can be transmitted for the purpose of execution thereof. Thus in effect the transfer of the decree is provided where the decree has to be executed by a mode of attachment and sale in a court of local limits in whose jurisdiction the said property is situated. S.46 of the said CPC provides for a precepts. Under the said section the court which has passed the decree issues a precepts to any court which would become competent to execute such a decree by attaching any property belonging to the judgment debtor as specified in the said precept. Now reading the provisions of s.38, s.39 and 46 and 51 together there is no manner of doubt that the execution of the decree under s.51 by attachment and sale ought to be transmission of the decree if the properties are situated outside the local limits of the court passing the decree. However when the execution of the decree is sought by a mode of execution via the court receiver under sub-clause(d) of s.51 then in that event the said decree cam be executed by the court passing the decree

itself even if the properties are not situated within the local limits of the said court. It is now well settled that the receiver can be appointed by the court passing the decree with all powers under order 40 rule 1 in execution of a decree and once the said receiver is appointed it has all powers conferred by the court for the purpose of execution of the said decree under clause 1(d) of s.51 the court passing the decree retains with itself power and jurisdiciton to execute the said decree.

22. Once the court puts a decree in execution by adopting one of the mode prescribed under S.51 of the CPC then the provisions of order 21 would apply in so far as it relates to the said mode of execution. The provisions are different for execution of a decree under different modes as provided under S. 51 of the CPC. In my opinion when the decree is put in execution the provisions of order 21 would be applicable which are in so far as applicable to the said mode of execution. The aforesaid view taken is supported by the judgment of the apex court in the

case of Tarinikamal Pandit (supra) in which the apex court has held that he provisions of order 21 rule 92 as well as S.66 of the CPC is not applicable when execution of decree is via the mode of appointment of the court receiver in execution. Simi;ar view has been taken by another judgment cited by the learned counsel for the plaintiff decree holder wherein also the supreme court has held that it is permissible that the receiver can be appointed in execution of the proceedings under s.51 and conferred with the powers under order 40 rule 1 of the CPC. However the broad contention raised by the learned counsel for the plaintiff decree holder that no provisions of order 21 are applicable when execution of a decree is by mode of Court Receiver under S.51(d) of the Code are required to be rejected because the apex court in para 9 of the aforesaid judgment in the case of Jibon Krishna(supra) has held that there can be some provisions of the Order 21 of CPC which would be applicable though they restrained themselves from identifying each of the provision of Order 21 which would be applicable in execution of decree by a mode of Court Receiver. Thus the broad proposition

advanced by the learned counsel for the plaintiff decree holder that no part of order 21 is applicable cannot be accepted. However the question that remains is whether s.39 applies, In my view the said provision of s.39 do not apply in a case of a execution of the decree through the court receiver because under s.38 of the CPC the court passing the decree is empowered to execute its own decree and only if the courts deems fit and necessary that the decree must be transmitted for the purpose of execution inrespect of the properties which are outside the local limits of that court that the provisions of s.39 would be applicable and this question arises in execution of decree via attachment and sale in respect of the properties which are outside the jurisdiction of the said court. In my opinion the provisions of s.39 do not apply in cases where the court desires to execute the decree by following the mode of execution prescribed under sub-caluse (d) of s.51 of CPC. The contention of the learned counsel for the defendant judgment debtor that the words "subject to such condition and limitation as may be prescribed under 51" must be read and mean one of the conditions as contemplated under s.39 of the

CPC also cannot be accepted because the provisions of s.39 are not the limitation prescribed for mode of execution under s.51. The limitations are prescribed under the provisions of order 21 and the said limitation is prescribed under order 21 must apply to each mode of the execution as contemplated and are as applicable to the said mode of execution under s.51. It is not possible to accept the contention that sub-secton 4 of s.39 is a limitation on execution of a decree by a court receiver because the provisions of s.39 do not in any manner suggest of an execution of a decree by a way of appointment of the court receiver. On the contrary the provisions of s.39 do suggest that the provisions are applicable only when the decree is sought to be executed by attachment and sale. In view of the aforesaid I do not find any substance in the contention advanced by the learned counsel for the defendant judgment debtor that by virtue of sub-section 4 of s.39 of CPC the execution of the decree by the plaintiff is bad in law and consequent auction sale conducted and the sale being effected in favour of third party purchaser is invalid and/or there are any material irregularities therein. In my

opinion the provisions of sub-section 4 of S.39 do not apply and has no application when the execution of the decree is via the mode of the court receiver under s.51(d) of the said code.

23. The reliance placed by the learned counsel for the defendant judgment debtor on the judgment of this court in the case of Bank of Tokyo Mitsubushi Ltd (spura) has no relevance to the present case. The provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1983 provides for an overiding provisions in S. 34 of the Act over other statues. Thus while considering the provision of S. 17 and 34 of the said Recovery of Debts Due to Banks and Financial Institutions Act, 1993 this court has held that the jurisdiction of all other courts has been ousted and the DRT will have an exclusive jurisdiction including in respect of the execution of the recovery certificate. In this context it has been held that the Court Receiver, High Court, Mumbai must ceased to be in possession of the properties once the said suit itself is transferred to the DRT. There is no non-obstenate clause in the present case. The

provisions of s.39 does not have any non-obstenate clause over other Acts nor the said provisions have any over riding effect on other provisions of the CPC.

24. In my opinion therefore the provisions of s.39 do not place any limitation on the power of the court under sub-clause (d) of s.51 of the CPC. In my opinion therefore the contention raised by the learned counsel for the defendant judgment debtor that the execution of the decree by mode of appointment of court receiver is invalid by virtue of introduction of sub-clause (4) of S.39 by Amending Act 22 of 2002 has no merit and the same is required to be rejected.

25. The aforesaid contention is also required to be rejected when the matter is looked from a slightly different perspective. The court receiver has been appointed simultaneously in a consent decree which has been passed by consent of the parties. The said consent decree appoints receiver in execution thereof. If I accept the contention of the learned counsel for the applicant to the aforesaid effect it will amount to nullifying the part of the decree which has been

passed by this court by consent of the parties. I It is a settled law that the executing court cannot go behind the decree and/or modify the decree passed by the competent court of jurisdiction. I cannot therefore nullify the part of the decree by accepting the proposition which has been advanced by the learned counsel for the defendant judgment debtor relying upon the provisions of sub-section 4 of s.39 of CPC. In view thereof I find that the present chamber summons has no merits and I accordingly dismiss the same. I direct the defendant judgment debtor to pay cost of the chamber summons quantified at Rs.10,000/-.

sd/-

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